February 20, 2018

BY FEDERAL EXPRESS AND E-MAIL
Administrator Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building – Mail Code 1101A
1200 Pennsylvania Ave., NW
Washington, DC 20460
Pruitt.Scott@epa.gov

Re: Petition for Partial Reconsideration of Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plan, 82 Fed. Reg. 60,520 (Dec. 21, 2017); EPA–R06–OAR–2016–0520; EPA–R06–OAR–2017–0129; FRL–9971–85–Region 6

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7607(d)(7)(B), Sierra Club and National Parks Conservation Association (collectively, "Petitioners") respectfully petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider certain aspects of the rule captioned as "Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plan," which was published at 82 Fed. Reg. 60,520 (Dec. 21, 2017). As explained below, the rule is unlawful, arbitrary, and capricious because the Louisiana State Implementation Plan (SIP) fails to include a long-term strategy.

The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).[1]

Sierra Club and NPCA are filing this petition as a protective matter only. EPA has violated the consent decree requiring final action that addresses all outstanding regional haze requirements for Louisiana, including the long-term strategy and reasonable progress requirements. The proper remedy for that violation is an order compelling EPA to either issue a federal implementation plan (FIP) or approve a revised SIP that contains a long-term strategy

[1] Because judicial review of the Final Rule is available by the filing of a petition for review within sixty days of the publication date the grounds for the objections arose "within the time specified for judicial review." 42 U.S.C. § 7607(d)(7)(B).

and reasonable progress analysis—elements absent from the plan EPA approved. If the district court does not order such relief, Sierra Club and NPCA have already filed a petition for judicial review of their objections to the long-term strategy and reasonable progress analysis, which were raised with reasonable specificity in comments to EPA. In short, this petition is being filed to ensure that Sierra Club and NPCA have a remedy if the District Court does not order EPA to issue a complete plan, and if the Court of Appeals does not reach the merits of this objection.

BACKGROUND

A. The Clean Air Act's Regional Haze Program

Since the nation's founding, the United States has valued its diverse and stunning natural scenery. *See, e.g.*, John Copeland Nagle, *The Scenic Protections of the Clean Air Act*, 87 N.D. Rev. 571, 576 (2011). In what has been lauded as "America's best idea," Congress first set aside national parks in the 19th century to preserve and celebrate some of the nation's most spectacular scenery. *Id.* With the nation's rapid industrialization, however, these remarkable scenic views have become increasingly marred by air pollution. *See id.* at 573. Today, air pollution is "perhaps the greatest threat to national parks," and pollution all too often degrades visibility in these iconic scenic areas. *Id.*

Recognizing the "intrinsic beauty and historical and archaeological treasures" of the national parks and wilderness areas,[2] Congress established "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). In 1990, after finding that the U.S. Environmental Protection Agency ("EPA") and the states had not made adequate progress toward reducing visibility impairment in the nation's Class I areas,[3] Congress amended the Clean Air Act to curb emissions that may reasonably be anticipated to cause or contribute to visibility impairment at national parks and wilderness areas. *Id.* § 7492.

Congress delegated implementation of the Clean Air Act's visibility program to EPA. In 1999, EPA promulgated the Regional Haze Rule, which requires the states (or EPA where a state fails to act) to make incremental, "reasonable progress" toward eliminating human-caused visibility impairment at each Class I area by 2064. 40 C.F.R. § 51.308(d)(1), (d)(3). In the 1999 regulations, EPA recognized that visibility impairing pollution was a regional problem that required regional solutions. Thus, the regulations create the necessary region-wide scheme for reducing pollution in order to achieve the goal of natural visibility in Class I areas. Accordingly, implementation plans must contain "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward the

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[2] H.R. Rep. No. 95-294, at 203-04 (1977), *reprinted in* 1977 U.S.C.C.A.N 1077, 1282.

[3] Areas designated as mandatory Class I Federal areas (or Class I for short) consist of national parks exceeding 6,000 acres, national wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. *See* 42 U.S.C. § 7472(a). Class I areas to natural conditions. Furthermore, the regional haze regulations require evaluation of *all* sources of visibility impairment.

national goal." 42 U.S.C. § 7491(b)(2). The Regional Haze Rule includes several interlocking measures designed to make "reasonable progress" towards achieving the 2064 natural visibility goal. These measures include requirements to (1) develop reasonable progress goals based on the evaluation of any and all sources contributing to visibility impairment; (2) determine baseline and natural visibility conditions; (3) create a long-term strategy for making reasonable progress; and (4) implement the best available retrofit technology (BART) for some of the oldest and dirtiest sources of haze-causing pollutants. *Id.*; 40 C.F.R. § 51.308(d), (e).

B. Reasonable Progress Goals and Controls

One of the main features of the Regional Haze Rule is the establishment of "goals (expressed in deciviews)[4] that provide for reasonable progress towards achieving natural visibility conditions." 40 C.F.R. § 51.308(d)(1). In developing these "reasonable progress goals" and the emission reductions needed to meet them, the state must consider four factors: (1) the costs of compliance, (2) the time necessary for compliance, (3) the energy and non-air quality environmental impacts of compliance, and (4) the remaining useful life of any potentially affected sources. 42 U.S.C. § 7491(g)(1); 40 C.F.R. § 51.308(d)(1)(i)(A), (d)(3). Given the statutory goal to eliminate all haze caused by "manmade air pollution," 42 U.S.C. § 7491(a)(1), states may consider all air pollution sources that contribute to impairment in Class I areas. EPA's regulations specify that states must look beyond major stationary sources to minor, area, mobile, and other sources when selecting the enforceable requirements that will achieve the reasonable progress goals. 40 C.F.R. § 51.308(d)(3)(iv).

For each Class I area within its borders, a state must determine the uniform rate of progress ("URP"), which is the amount of progress that, if kept constant each year, would ensure that natural visibility conditions are achieved in 2064. 40 C.F.R. § 51.308(d)(1)(i)(B). If a state selects a reasonable progress goal that achieves a slower rate of progress than the URP, the state must demonstrate, based on the four reasonable progress factors, "that the rate of progress for the implementation plan to attain natural conditions by 2064 is not reasonable; and that the progress goal adopted by the State is reasonable." *Id.* § 51.308(d)(1)(ii).

Congress required states and EPA to consider four factors in determining the pollution controls and other measures that define reasonable progress. 42 U.S.C. § 7491(g)(1). The statute does not list visibility improvement as a fifth factor in the reasonable progress analysis. *Id.* In determining whether each state's haze plan satisfies the statutory mandate to make reasonable progress, EPA reviews whether the state follows the requirements to consult with other states and federal land managers and considers the four statutory factors for in issuing requirements to satisfy reasonable progress. 40 C.F.R. §§ 51.308(d)(1)(iii)(iv) and (i). While reasonable progress goals provide critical context for assessing and ascribing gains necessary to meet the statutory mandate of attaining natural visibility at all Class I area national parks and wilderness areas, it is the pollution controls and other measures to reduce

[4] A deciview is a measurement of visibility impairment. A deciview is a haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired. 40 C.F.R. § 51.301.

visibility impairing pollution that are enforceable.

C. Long-Term Strategy

A regional haze implementation plan must, among other things, include emission limits, schedules of compliance, and "all measures necessary" to make reasonable progress towards achieving natural visibility conditions. 40 C.F.R. § 51.308(d)(3)(ii). In developing a long-term strategy, a state must look at and beyond major stationary sources to include area, mobile, and minor sources, *id.* § 51.308(d)(3)(iv), as well as a number of other sources of impairment such as construction, agricultural, and forestry practices. *Id.* § 51.308(d)(3)(v). The long-term strategy must be sufficient to achieve reasonable progress for both the Class I areas within a state's borders as well as the out-of-state areas affected by the state's emissions. *Id.* § 51.308(d)(3). To ensure that each state does its part to address regional haze, a state that contributes to impairment at another state's Class I area must consult with the state or states home to the Class I area/s impacted by its sources. *Id.* § 51.308(d)(3)(i). In addition, because the federal land managers are charged with the management of federal Class I areas, the Clean Air Act requires that they be made an early and integral part of the consultation process 40 C.F.R. §§ 51.308(i).

Consultation proceeds based in part on analyses of how much impairment at a given Class I area is due to emissions from each state. Each state then must document the technical basis by which it determines its share of the emissions reductions necessary to make reasonable progress at a Class I area. *Id.* § 51.308(d)(3)(iii). After fulfilling the procedural requirements for consultation, a state must ensure that its haze plan satisfies the primary substantive requirement for a long-term strategy: to include the enforceable measures necessary to make reasonable progress at each Class I area affected by the state's emissions. *Id.* § 51.308(d)(3).

D. Procedural Background

Despite the significant haze-causing pollution from Louisiana sources, Louisiana and EPA have both long delayed meeting the requirements under the Regional Haze Rule. In 2008, Louisiana submitted a woefully inadequate regional haze cleanup plan that did not require a single source to install any controls to reduce haze-causing air pollution, despite indisputable impacts to visibility impairment at in- and out-of-state Class I areas, such as Breton National Wildlife Refuge and Caney Creek National Wilderness Area. Instead, the State relied on EPA's Clean Air Interstate Rule ("CAIR") to demonstrate reasonable progress toward the goal of achieving natural visibility at both in- and out-of-state Class I areas. Adopted in 2008, the Clean Air Interstate Rule was an emissions trading program for electric generating units that was designed to address interstate transport of SO_2 and NOx pollution in the eastern United States, including Louisiana. Although EPA had concluded that states could rely on the Clean Air Interstate Rule as a substitute for source-specific BART controls, the D.C. Circuit invalidated the trading program and remanded the rule to EPA.

In its final disapproval of Louisiana's 2008 Regional Haze submittal, EPA concluded that the State's long term strategy and its reasonable progress goals were deficient because Louisiana's reasonable progress goals were impermissibly linked to the invalidated CAIR rule.

77 Fed. Reg. at 39428 (final disapproval discussing deficiencies); 77 Fed. Reg. at 11847 (proposed disapproval); *see* 77 Fed. Reg. 33642 (final disapproval of Regional Haze SIPs, including Louisiana, that relied on CAIR better than BART rule); *see also* Ex. 7, EPA Technical Support Document at 33. Because Louisiana's SIP failed to reflect appropriate emissions from BART, EPA concluded that the State would be required to reconsider its reasonable progress goals. Moreover, EPA concluded that Louisiana would "have to consider whether EGUs previously covered by CAIR, *whether subject to BART or not*, should be controlled to ensure reasonable progress." 77 Fed. Reg. at 39427; 77 Fed. Reg. at 11847 (emphasis added).

E. The Louisiana SIP Submission and EPA's Approval

Despite EPA's clear admonition to reconsider reasonable progress, *see* 77 Fed. Reg. at 39427, 77 Fed. Reg. at 11847, and contrary to the plain requirements of the Clean Air Act and Regional Haze Rule itself, Louisiana's SIP revision failed to evaluate whether additional emission reductions from BART and non-BART sources would be reasonable, or are necessary to make reasonable progress toward the national visibility goal. In particular, the revised SIP failed to evaluate (or even mention) one of the largest sources of visibility-impairing SO_2 and NOx emissions in the State—Cleco Power's lignite-fired Dolet Hills Power Station. Given that Dolet Hills consistently ranks as one of the largest emitters of SO2 and NOx in the State and given EPA's unequivocal finding that Louisiana must reevaluate controls for all EGUs, "*whether subject to BART or not*," 77 Fed. Reg. at 39427; 77 Fed. Reg. at 11841, 11847, 11854 (emphasis added), Louisiana's failure to consider reasonable progress controls for Dolet Hills renders its proposed SIP unapprovable. Louisiana's failure to consider reasonable progress controls for Dolet Hills is especially problematic given that the State has *not* demonstrated that it is meeting the Uniform Rate of Progress and that the proposed SIP revision failed to require any emission reductions from BART-eligible sources.

In its proposed approval of the Louisiana regional haze SIP, EPA did not evaluate, or even mention, Louisiana's long-term strategy or whether the State properly evaluated any additional emission reductions necessary to make reasonable progress towards natural visibility at affected Class I areas. 82 Fed. Reg. 22,936 (May 19, 2017). In the final rule, however, EPA stated for the first time that the approval of Louisiana's BART determinations also satisfied any remaining obligation to evaluate reasonable progress. 82 Fed. Reg. 60,520, 60,540 (Dec. 21, 2017). In particular, EPA noted that in disapproving Louisiana's 2008 SIP submission, "[w]e finalized that action, which specifically disapproved the State's LTS, but only insofar as it relied on deficient BART determinations." *Id.* EPA argues that because the State's revised SIP purportedly "cured" those deficiencies, the State had also cured the deficiencies in the long-term strategy. *Id.* EPA failed to provide public notice or an opportunity to comment on this new rationale, and if Petitioners had been provided such an opportunity, Petitioners would have commented that EPA's explanation is not supported by the evidence and is unlawful.

EPA MUST CONVENE A RECONSIDERATION PROCEEDING AS TO THE LOUISIANA SIP APPROVAL

I. Petitioners are entitled to reconsideration of EPA's final approval of the Louisiana SIP.

Under the Clean Air Act, the Administrator "shall convene a proceeding for reconsideration of the rule" if a petitioner demonstrates: (1) that it was impracticable to raise the objection during the public comment period or the grounds for the objection arose after the close of the public comment period; and (2) that the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). The objections presented in this petition plainly satisfy both requirements. First, the grounds for Petitioners' objections "arose after the period for public comment," *id.*, which closed on June 19, 2017.[5] The grounds for these objections did not arise until the final SIP approval was published on December 21, 2017, when EPA articulated its so-called reasonable progress and long-term strategy analysis for the first time. That explanation was not mentioned at all in EPA's proposed approval. Given that Petitioners had no prior notice of EPA's approach to reviewing and evaluating Louisiana's empty long-term strategy or its reasonable progress analysis adopted in the rule, it would have been impracticable for Petitioners to raise these objections during the public comment period.

Second, as explained below, each of Petitioners' objections is "of central relevance to the outcome of the rule," 42 U.S.C. § 7607(d)(7)(B), in that they demonstrate that EPA's approval of the Louisiana SIP was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7607(d)(9)(A). Because both of the Clean Air Act's prerequisites for reconsideration are met, 42 U.S.C. § 7607(d)(7)(B), EPA "lack[s] discretion not to address the claimed errors." *North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir. 2008).

II. EPA's reliance on Louisiana's BART determinations to satisfy reasonable progress and the long-term strategy is arbitrary, capricious and an abuse of discretion.

EPA's final rule, which effectively relieves Louisiana of the obligation to evaluate reasonable progress and a long-term strategy, is arbitrary, capricious, and an abuse of discretion for several reasons. First, the Clean Air Act requires EPA either to approve a corrected long-term strategy or to issue a federal plan containing a long-term strategy. *See* 42 U.S.C. § 7410(c)(1)(B). EPA has done neither, instead choosing to ignore the long-term strategy requirements altogether.

Second, the State (or EPA, where the State fails to do so) is obligated to consider the four statutory factors to determine whether controls or others measures are needed at BART and/or non-BART sources in order to make reasonable progress. This requirement flows from the statute itself, which requires that each haze SIP include "measures as may be necessary to make reasonable progress." 42 U.S.C. § 7491(b)(2). In determining "reasonable progress," states and EPA must consider four factors: the cost of compliance, the time necessary for compliance, the nonair environmental quality impacts of compliance, and the source's remaining useful life. 42 U.S.C. § 7491(g)(1). Neither the State nor EPA evaluated, let alone mentioned, whether any additional emission reductions from any source were necessary to make reasonable progress at

[5] *See* 82 Fed. Reg. at 22,936.

any Class I area. Even under the previous version of the Regional Haze Rule, EPA's longstanding interpretation has been that states must conduct a four-factor analysis of whether control measures are needed at emitting sources in order to make reasonable progress—regardless of whether such measures are needed to attain reasonable progress goals or the uniform rate of progress. *See* 82 Fed. Reg. 3078 (Jan. 10, 2017).

The Revised Regional Haze Rule, 82 Fed. Reg. 3078, explicitly brings the long-term strategy regulations in line with the statutory command to contain measures as necessary to make reasonable progress. Under the new requirements, "[t]he long-term strategy must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv)." 40 C.F.R. § 51.308(f)(2).[6] Section (f)(2)(i), in turn, requires that:

> The State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment. The State should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources. The State must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy.

Id. § 51.308(f)(2)(i). Neither the State nor EPA even attempted to comply with the long-term strategy requirements in the statute and the regulations, *see* 42 U.S.C. § 7491(b)(2), (g)(1), 40 C.F.R. § 51.308(d)(3), (f)(2)(i). There is no evidence that the State submitted a revised submittal which "evaluate[d] and determine[d] the emission reductions measures that are necessary to make reasonable progress" by evaluating the four statutory factors, *id.* Nor is there any evidence of criteria the State used to evaluate which sources should be evaluated in the reasonable progress analysis, *id.*, and how the four factors were considered, *id.*

Third, EPA's final approval arbitrarily neglects its own regulations and reverses course from its previously articulated expectations without explanation. In disapproving various portions of Louisiana's 2008 haze submittal, EPA expressly stated that the State would have to produce a revised long-term strategy that analyzed both BART and non-BART sources. 77 Fed. Reg. 11,839, 11,847 (Feb. 28, 2012) ("Consequently, Louisiana will have to reconsider whether reductions of SO_2 from EGUs, whether subject to BART or not, are appropriate for ensuring reasonable progress."). EPA's final approval unlawfully fails to include a corrected long-term strategy that evaluates "whether reductions of SO_2 from EGUs, whether subject to BART or not, are appropriate for ensuring reasonable progress," and fails to explain the agency's departure from its earlier findings regarding the need for a proper long-term strategy.

[6] In the Revised Regional Haze Rule, EPA reorganized the provisions of the rule, so that the long-term strategy requirements now appear in 40 C.F.R. 51.308(d)(2) rather than 40 C.F.R. 51.308(d)(3).

Finally, as noted in comments Petitioners submitted to EPA, under any reasonable criteria for screening sources, Dolet Hills should be evaluated for additional, cost-effective emission reductions under the Regional Haze Rule's long-term strategy and reasonable progress requirements. Cleco Power's lignite-fired Dolet Hills Power Station is one of the largest sources of visibility-impairing SO_2 and NO_X emissions in Louisiana. And as demonstrated by expert analysis, EPA must evaluate whether emission reductions at Dolet Hills are appropriate to achieve reasonable progress towards the national visibility goal.[7]

CONCLUSION

For all the foregoing reasons, EPA must reconsider the approval of Louisiana's regional haze SIP.

Sincerely,

/s/ Joshua Smith

Joshua Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5560
joshua.smith@sierraclub.org

Counsel for Sierra Club

Stephanie Kodish
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902
(856) 329-2424 ext. 28
skodish@npca.org

Counsel for National Parks Conservation

Charles McPhedran
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

[7] *See* Victoria R. Stamper, Technical Support Document and Accompanying Exhibits, Comments of Conservation Associations, EPA's Proposed Approval of Louisiana's Regional Haze State Implementation Plan, Docket ID No. EPA-R06-OAR-2017-0129-0018 (June 18, 2017).

Matthew Gerhart
3639 N. Clayton Street
Denver, CO 80205
(510) 847-7721
megerhart@gmail.com

Counsel for National Parks Conservation Association and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018 I filed National Parks Conservation Association and Sierra Club's Petition for Partial Reconsideration of **Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plan 82 Fed. Reg. 60, 520 (Dec. 21, 2017); EPA–R06–OAR–2016–0520; EPA–R06–OAR–2017–0129; FRL–9971–85–Region 6**, via email and Federal Express, to:

Administrator Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building – Mail Code 1101A
1200 Pennsylvania Ave., NW
Washington, DC 20460
Pruitt.Scott@epa.gov

Further, I certify that on February 20, 2018, I served a courtesy copy of the foregoing, via email, to:

Kevin Minoli
Acting General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460
Minoli.Kevin@epa.gov

Lea Anderson
Office of General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460
Anderson.Lea@epa.gov

Air & Radiation Docket
A-and-R-Docket@epa.gov

February 20, 2018

Sincerely,

/s/ Lauren Hogrewe

Lauren Hogrewe
Litigation Assistant
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5789
lauren.hogrewe@sierraclub.org